Supreme Court, U.S.
FILED
AUG 24 2000
OFFICE OF THE CLERK

No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF 21 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Capital Case

QUESTION PRESENTED

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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INTEREST OF THE *AMICI* STATES

The State of Ohio and 20 other *amici* States write to urge the Court to reverse the judgment of the Texas Court of Criminal Appeals in this case. At stake is the scope of the Sixth Amendment right to counsel where one suspect has committed two distinct – although temporally related – crimes. Some lower courts, including the court below, have misinterpreted this Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), by overlooking the "offense specific" nature of the Sixth Amendment. Just because a suspect's right to counsel has attached in connection with one of his crimes, the Sixth Amendment does not bar the police from inquiring about all others.

Two vital societal interests of importance to the States are at issue here: (1) the States' prerogative to investigate crime and convict the guilty and (2) the States' (sometimes countervailing) interest in protecting their citizens from police circumvention of constitutional rights. These concerns are of particular moment where, as here, one person is accused of two factually related but legally distinct offenses. When can an accused effectively and voluntarily waive his right to counsel with respect to a particular offense after earlier accepting the appointment of counsel for another criminal charge? Where a properly Mirandized suspect is willing to talk about Crime A, are police forever barred from questioning him about it simply because a court has already appointed counsel for that suspect concerning Crime B?

The way in which the Texas Court of Criminal Appeals answered those questions – barring police interrogation even where a willing and well-informed suspect wants to answer questions – is not compelled by the Sixth Amendment, and would significantly hinder the States' ability to effectively investigate crime, while giving little benefit to accused persons beyond the protections already

properly available to them under *Miranda v. Arizona*, 384 U.S. 436 (1966). We therefore urge the Court to reverse the judgment below.

SUMMARY OF ARGUMENT

We address in this brief only the second question in the petition, and that question boils down to this: Once a state trial court had appointed counsel for respondent Cobb on a burglary charge, could Cobb, without consulting that attorney, knowingly and intelligently agree to police questioning about two unsolved murders? The Texas Court of Criminal Appeals said "no," finding that Cobb's Sixth Amendment right to counsel had attached on the murder investigation once Cobb was arraigned on the burglary charge. Because that judgment is inconsistent with this Court's Sixth Amendment jurisprudence, and because the appellate court's approach would frustrate both the legitimate interests of law enforcement and the express wishes of properly-Mirandized criminal suspects, that judgment should now be reversed.

The Court's Sixth Amendment decisions of the past three decades point toward a different outcome than the one reached by the court of appeals in this case. While a suspect who has been arraigned and who has not agreed to waive his *Miranda* rights may not be questioned, *see Brewer v. Williams*, 430 U.S. 387 (1977), and though police may not secure admissions by secretly recording a defendant's conversations after he has secured counsel, *see Maine v. Moulton*, 474 U.S. 159 (1985), this case involves no similar end-run around the Sixth Amendment by the police.

If, as the Court has said, the right to counsel under the Sixth Amendment is "offense specific," *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991), Cobb's knowing consent to police questioning about an offense with which he had not yet been

charged, and for which he certainly did not have counsel, was proper. The interrogation in this case violated neither the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the police to provide specific warnings to suspects in custody before questioning them), nor the Court's more recent holding in *Michigan v. Jackson*, 475 U.S. 625 (1986) (barring police-initiated interrogation about a criminal charge once the defendant has been appointed counsel for that charge).

But precedent alone cannot resolve this case, of course, and the "closely related" test – an easily-named but hard-to-apply test that lower courts have developed for determining whether a defendant's lawyer for one criminal charge should be considered his lawyer for a related offense – has created uncertainty in cases like this. The "closely related" test is fact-intensive, and it has led to uneven results in the lower courts. If, as *McNeil* suggests, police may question a suspect about one offense even if that suspect already has counsel for some other offense, a clearer test is needed so that police and prosecutors can know whether they may question any given suspect, and if so, what issues they may explore with him.

In place of the "closely related" test, we offer a so-called "knowing circumvention" test. Under this latter bright-line test, police could question a suspect about a new offense as long as they did not intentionally undercut the suspect's right to counsel, as happened in *Brewer*, *Moulton*, and *Jackson*. Such a test holds true to the limits on police overreaching set by those cases, even as it permits police to question a properly-Mirandized suspect about new crimes with which he has not yet been charged. Under the "knowing circumvention" approach, the police in this case properly secured respondent Cobb's knowing consent to talk with them about two murders, even though he already had counsel for a pending burglary charge.

Finally, even if the Court adopts the "closely related" test as the proper approach in cases like this, the lower court misapplied that test to these facts. The pending burglary charge against respondent Cobb was factually distinct from the murders to which he confessed during police questioning, so the judgment vacating Cobb's convictions should be reversed even if the "closely related" analysis is the proper one for this case.

ARGUMENT

At issue here is the scope of the Sixth Amendment right to counsel where one suspect is implicated in two offenses. Respondent Cobb voluntarily confessed to two counts of capital murder after law enforcement officers fully explained his *Miranda* rights to him. However, because counsel had already been appointed for Cobb on a related burglary charge (unbeknownst to the officers to whom he confessed in another county), and because the interrogating officers failed to secure the attorney's permission before questioning Cobb about the murders, Cobb's confessions were thrown out and his convictions vacated.

The court of appeals did so even though the murder charges were in no way predicated on the burglary offense. Neither Texas law nor the record disclose any element of the murder offenses that would also constitute an element of the previously-charged burglary offense (save the venue and date), and likewise, no element of the burglary offense overlaps with the essential elements of the murder charges. While the murders occurred during a sequence of events starting with Cobb's burglary of a home, those murders remain factually and legally distinct from that first offense.

A. This Court's Cases Bar Police From "Knowingly Circumventing" The Accused's Right To Counsel.

All can agree that once a suspect's Sixth Amendment right to counsel has attached and been invoked, the police may not initiate an interrogation of him about a crime without first securing the permission of his lawyer. *See Brewer v. Williams*, 430 U.S. 387 (1977); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988). However, that right to counsel attaches only when adversary judicial proceedings have been initiated, either "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). And because the Sixth Amendment is "offense specific," it "cannot be invoked once for all future prosecutions." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

When a suspect makes voluntary "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached," those statements "are, of course, admissible at a trial of those offenses." *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985). The reason for such a rule is plain, for "[t]he police have an interest . . . in investigating new or additional crimes [perhaps committed by] individuals already under indictment." *Id.* at 179. Any rule extending a Sixth Amendment right to counsel to every possible activity committed by someone against whom a criminal charge is already pending "would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id.* at 180.

In this case, the trial court's appointment of counsel for Cobb at his arraignment on the burglary charge was limited to that charge alone, not to other offenses that he may have committed. The Texas Court of Criminal Appeals should have so held, thereby preserving the law enforcement

officers' authority to investigate other crimes apart from the burglary, and allowing them to interview Cobb about other crimes if he knowingly and intelligently agreed to speak with them.

Instead, the court below applied a lawyer-for-one/lawyer-for-all approach to the additional criminal charges for which Cobb later became a suspect. The court cited what it described as a "Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is *very closely related factually* to the offense charged." Pet. App. at A-6 (emphasis added). In deciding whether the burglary charge and two capital murder offenses involving separate conduct and completely different elements constituted "very closely related" offenses, the Texas court observed only that the murders were "factually interwoven" with the burglary. Pet App. at A-7.

The Texas court's error stems in part from analysis developed by lower courts before this Court's decision in *McNeil*. Those earlier decisions in turn rested on this Court's decisions in *Brewer* and *Moulton*. In *Brewer*, the suspect incriminated himself when the police – who had promised the suspect's lawyer that they would not question the suspect – prompted him to talk while riding in a police cruiser after his arraignment. That defendant already had a lawyer for a pending abduction charge, and he never agreed to waive his *Miranda* rights before talking with the police in the car. The Court found his incriminating words and actions inadmissible in a related murder case. In *Moulton*, police obtained admissions by surreptitiously recording a defendant's conversations with a co-defendant after the defendant had been charged with theft and after a lawyer had been appointed for him. Again, this Court set aside the admissions and resulting convictions, holding that the police had violated the defendant's Sixth Amendment right to counsel.

The *Brewer* and *Moulton* cases together bar the government from obtaining incriminating statements by "knowingly circumventing" the accused's right to have counsel present during custodial interrogation. *Moulton*, 474 U.S. at 176. And likewise, in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court faulted police officers for interrogating "an uncounseled prisoner who ha[d] asked for the help of a lawyer." *Id.* at 631 (holding that where police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid). While the Court's holding in *Jackson* does not address a situation like the one here, where the interrogation concerned new crimes for which no charges were yet pending, we see as critically important in *Brewer*, *Moulton* and *Jackson* the obligation of law enforcement officers to refrain from interrogation about any particular crime once the right to counsel has attached to it.

Still, nothing in those cases bars the police from doing just what they did here: asking a suspect if he is willing to waive his *Miranda* rights and speak with them about new offenses distinct from those with which he has already been charged. Honest and thorough police work ought to be encouraged in that situation, and willing and intelligent suspects ought to be free to make the knowing and voluntary choice that respondent Cobb made in this case.

B. The "Inextricably Intertwined" Or "Closely Related" Test Employed By The Lower Court Lacks A Principled Basis In The Sixth Amendment.

In an effort to reconcile the limits on police interrogation described in *Brewer*, *Moulton*, and *Jackson* with the "offense specific" nature of the Sixth Amendment

described in *McNeil*, several state and federal courts weighing the Sixth Amendment rights of defendants facing multiple criminal charges have developed the "inextricably intertwined" or "closely related" test. Under that approach, when two offenses seem closely tied on the facts, courts have tended to find that a lawyer who represents a defendant for his role in one offense also automatically represents him for any possible related cases, even though *McNeil* describes the Sixth Amendment as offense-specific. *See, e.g., United States v. Arnold*, 106 F.3d 37, 40-41 (3d Cir. 1997); *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993), *cert. denied*, 511 U.S. 1059 (1994); *United States v. Doherty*, 126 F.3d 769, 776 (6th Cir. 1997), *cert. denied*, 524 U.S. 917 (1998); *United States v. Hines*, 963 F.2d 255, 257-58 (9th Cir. 1992); *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988); *Whittlesey v. State*, 665 A.2d 223, 233-36 (Md. 1995), *cert. denied*, 516 U.S. 1148 (1996).

The majority of these cases focus "entirely on whether the facts underlying the charged and uncharged offenses are either 'closely related' or 'inextricably intertwined[.]'" *Arnold*, 106 F.3d at 41. As the Third Circuit has said, courts have tried to determine "whether the same acts and factual predicates underlie both the pending and the new charges," *id.*, and whether the uncharged and charged offenses "arose from the same predicate facts, conduct, intent and circumstances." *Id.* at 42.

This Court has never determined whether this post-*McNeil* melding of legal representation for related offenses (and the resulting ban on police interrogation for the second offense, even where the accused knowingly and voluntarily wishes to speak with the authorities) is compelled by the Sixth Amendment. As one lower court has said, the "'precise boundaries' of the '"offense-specific" limitation' have yet to be 'flesh[ed] out.'" *People v. Clair*, 828 P.2d 705, 721 (Cal.

1992) (quoting *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting)), *cert. denied*, 506 U.S. 1063 (1993).

Unfortunately, this uncertainty has led to a result that does not advance the States' interest in protecting citizens from police overreaching (for here, the defendant knowingly and intelligently agreed to speak with the police about the murders even though – unbeknownst to them – he already had a lawyer on his separate burglary charge), and surely frustrates Texas's interest in punishing a murderer (for the judgment below tossed out Cobb's confession and convictions). That outcome cannot be reconciled with *McNeil*'s requirement that the prophylactic -Sixth Amendment protection articulated in *Jackson* be applied only on an "offense specific" basis.

C. A "Knowing Circumvention" Test Offers Clearer Guidance For Police, While Preserving The Important Interests Advanced By The Sixth Amendment.

Rather than wrestling with the "closely related" test for deciding whether the right to counsel has attached to any of several pending or potential criminal charges, courts ought to look instead for any knowing circumvention of a suspect's right to counsel. Absent that, police should be free to speak with a properly-Mirandized suspect about offenses with which he has not been charged, and for which he has not yet sought counsel. Several lower courts have already applied such a test. *See, e.g., United States v. Nocella*, 849 F.2d 33, 36-37 (1st Cir. 1988); *United States v. Martinez*, 972 F.2d 1100, 1105-06 (9th Cir. 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339,1342-43 (10th Cir. 1991). The *amici* States now urge this Court to likewise adopt that test, and to apply it to these facts.

The Court has "repeatedly emphasized the virtues of a bright-line rule" in interrogation cases. *Roberson*, 486 U.S. at 681. *See also Jackson*, 475 U.S. at 634; *Minnick*, 498 U.S. at 151; *Smith v. Illinois*, 469 U.S. 91, 98 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). The "inextricably intertwined" or "closely related" concept fails to give police officers the kind of bright line they want and need. Under that test, they are left to guess whether a court will later find that two distinct crimes – like the burglary and murder offenses committed by respondent Cobb – are so similar that the lawyer for the first charge should be treated as the lawyer for any possible later charges.

Under a knowing circumvention test, officers could interrogate a properly-Mirandized suspect about a new as-yet-uncharged crime unless they knowingly tried to undercut or circumvent his Sixth Amendment rights. Not only does such a test address the sometimes-competing interests of thorough police work on the one hand, and protection of accused persons from police overreaching on the other, but that test also reinforces the Court's holdings in *Brewer*, *Moulton* and *Jackson* while preserving *McNeil*'s "offense specific" view of the Sixth Amendment right to counsel. This knowing circumvention test would apply whenever the police breach their "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Moulton*, 474 U.S. at 171, while still allowing willing suspects to waive their *Miranda* rights and talk about crimes for which they do not yet have legal representation.

Additionally, language in *Moulton* supports this view. In that case, the Court held that the government violated the defendant's Sixth Amendment right to counsel by interrogating him post-indictment without counsel, even though this interrogation was part of a legitimate investigation of "new" crimes. *Id.* at 176-80. However, the

Court held only that the government may not elicit from, and ultimately use against, the defendant "incriminating statements pertaining to pending charges" if in obtaining the evidence the government "knowingly circumvent[s]" the defendant's right to counsel. *Id.* at 180. Thus, the Court held that knowing exploitations by the State of the opportunity to confront the accused outside the presence of counsel violates the Sixth Amendment. *See id.* at 176. In *Moulton*, the Court found a knowing circumvention of the accused's Sixth Amendment rights because the incriminating conversation was recorded by an undercover informant working as an agent of the government. However, the Court further noted that the right to counsel is not violated when the State obtains incriminating evidence by luck or happenstance after judicial proceedings have commenced. *Id.* at 176.

Similarly, in *Brewer*, this Court held that an arraigned defendant's incriminating statements were inadmissible at trial because the officer's speech about giving the victim a "Christian burial" was tantamount to interrogation. Again, under a "knowing-circumvention" analysis, the officer's conduct in *Brewer* violated the defendant's Sixth Amendment right to counsel because the police surreptitiously elicited information after adversary proceedings had begun. *Id.* at 399-401.

However, there is no reason why either *Brewer* or *Moulton* should compel exclusion of the confession here, for neither of those cases involved an admittedly voluntary confession by a suspect who had explicitly waived his *Miranda* rights and agreed to speak with the authorities about an offense different from the one on which he had been arraigned with counsel. In this case, there is no evidence that the police knowingly circumvented Cobb's Sixth Amendment rights. To the contrary, the record demonstrates that the officers informed Cobb of his *Miranda* rights, and he then knowingly and voluntarily waived them. Furthermore,

the police who questioned Cobb did not know that he had counsel on the related burglary charge. In short, there is no evidence that the police attempted to circumvent Cobb's Sixth Amendment rights, knowingly or otherwise. Excluding Cobb's confession only frustrates Cobb's own wishes, and penalizes the police for actions that were both reasonable and fair. Under a "knowing circumvention" test, the police validly secured a knowing and voluntary confession from Cobb, and that confession was properly admitted at his trial.

D. Even If The Court Adopts The "Closely Related" Test, The Facts Of This Case Support Reversal Of The Judgment Below.

Even if the Court does not adopt the "knowing circumvention" test, it should still reverse the Texas Court of Criminal Appeals because that court applied an inappropriately broad interpretation of the "closely related" test in this case. The existing offense-specific rule of *Jackson* and *McNeil*, operating in conjunction with the Fifth Amendment principles of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), is fully adequate to protect criminal suspects. The record here demonstrates as much: respondent Cobb, though fully apprised of his right to remain silent, opted to speak with the authorities about murders that he had committed nearly two years earlier. Just because he had confessed to a related burglary some seven months after committing both crimes, and though the trial court had appointed counsel for Cobb on that burglary charge, Cobb remained free to voluntarily speak with authorities about other crimes. No compelling interest of either criminal defendants or the States is served by a rule that bars the police from interrogating a suspect in this situation. The contrary decision of the court below now merits reversal.

Here, the burglary and murder offenses differed, and certainly neither charge was a lesser-included offense of the

other. The rule established by the court below does not address the very problem that the "closely related" test was designed to cure: police officers' ability to "circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes." *Arnold*, 106 F.3d at 41 (quoting *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992), *appeal denied*, 634 A.2d 1117 (Pa. 1993)). In this case, respondent Cobb knowingly and voluntarily waived his *Miranda* rights and confessed to the murders. The police neither forced him to confess against his will, nor tricked him into talking about the crime for which he already had counsel. Thus the application of the "closely related" test by the lower court failed to accomplish the very purposes of that test.

Additionally, the Texas appellate court's broad reading of the Sixth Amendment right to counsel runs counter to the reasoning of *Moulton* and *McNeil*, which emphasized both the narrow application of the Sixth Amendment right to counsel and the importance of allowing police to initiate and pursue investigations. Accordingly, even if the Court adopts the "closely related" test, it should nonetheless overturn the judgment below, because the offenses in this case did not overlap factually or legally.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals should be reversed.

Respectfully submitted,

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August 2000